92-2052

No. _____

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OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1993

CENTRAL ARIZONA WATER CONSERVATION DISTRICT, CENTRAL ARIZONA IRRIGATION AND DRAINAGE DISTRICT, MARICOPA-STANFIELD IRRIGATION & DRAINAGE DISTRICT, and NEW MAGMA IRRIGATION & DRAINAGE DISTRICT, Arizona Municipal corporations,

Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

CENTRAL ARIZONA WATER CONSERVATION DISTRICT'S PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Did the EPA's Final Rule imposing one billion dollars of emissions control requirements upon the Navajo Generating Station to allegedly reduce visibility impairment in the Grand Canyon violate the visibility regulations EPA promulgated under the Clean Air Act in 1980?

LIST OF PARTIES

The parties to the proceedings below were petitioner Central Arizona Water Conservation District, and four irrigation districts,[1] respondent United States Environmental Protection Agency ("EPA"), and respondent-intervenors Salt River Project Agricultural Improvement and Power District ("SRP"), Grand Canyon Trust and The Wilderness Society.

The respondent before this Court is the United States Environmental Protection Agency.

Petitioners Central Arizona Water Conservation District, Central Arizona Irrigation and Drainage District, Maricopa-Stanfield Irrigation and Drainage District and New Magma Irrigation and Drainage District (collectively, "CAWCD" or "Petitioner") are political subdivisions of the State of Arizona and have no parent companies or subsidiaries to list pursuant to Rule 29.1.

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[1] Central Arizona Irrigation and Drainage District, Maricopa-Stanfield Irrigation and Drainage District, New Magma Irrigation and Drainage District, and Harquahala Valley Irrigation District. Harquahala Valley Irrigation District is no longer a Central Arizona Project subcontractor and is therefore not a party to this petition for a writ of certiorari.

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IN THE SUPREME COURT OF THE UNITED STATES
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CENTRAL ARIZONA WATER CONSERVATION DISTRICT, et al.,
Petitioners,
v.
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The petitioner Central Arizona Water Conservation District, *et al.* respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit, entered in the above-entitled proceedings on March 25, 1993.

OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit is reported at 990 F.2d 1531 (9th Cir. 1993) and is reprinted in the Appendix hereto.

The Environmental Protection Agency's Final Rule entitled "Approval and Promulgation of Implementation Plans: Revision of Visibility FIP for Arizona" was reported at 56 Fed. Reg. 50172 (October 3, 1991) (the "Final Rule") and is reprinted in the Appendix hereto, at pages 1 through 57.

JURISDICTION

On December 2, 1991, invoking jurisdiction under 42 U.S.C. § 7607(b)(1), Clean Air Act ("CAA") § 307(b)(1), the Petitioner filed a petition for review seeking reversal or remand of the Final Rule.

On March 25, 1993 the Ninth Circuit entered a judgment and an opinion holding that the EPA had acted within its statutory and regulatory authority when it promulgated the Final Rule. No petition for rehearing was filed.

The jurisdiction of this Court to review the judgment of the Ninth Circuit is invoked under 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS INVOLVED

42 U.S.C. § 7491, Visibility Protection for Class I Areas [CAA § 169A]

42 U.S.C. § 7607, Administrative Proceedings and Judicial Review [CAA § 307]

56 Fed. Reg. 50172 (October 3, 1991): "Approval and Promulgation of Implementation Plans: Revision of the Visibility FIP for Arizona"

53 Fed. Reg. 35956 (September 15, 1988): "Assessment of Visibility Impairments and Integral Vista Identification: Proposed Rule"

52 Fed. Reg. 7802 (March 12, 1987): "State Implementation Plans for Visibility Long-Term Strategies, Integral Vistas and Implementation Control Strategies: Proposed Rulemaking"

45 Fed. Reg. 80084 (December 2, 1980): "Visibility Protection for Federal Class I Areas: Final Rulemaking"

45 Fed. Reg. 34762 (May 22, 1980): "Visibility Protection for Federal Class I Areas: Proposed Rulemaking"

40 C.F.R. § 51.300 *et seq.*

40 C.F.R. § 52.145

40 C.F.R. § 52.26

Pursuant to Supreme Court Rule 14.1(f), due to their length, the pertinent text of the above-cited statutes and regulations is reproduced in the Appendix hereto.

STATEMENT OF THE CASE

On October 3, 1991, the EPA promulgated a Final Rule requiring a 90% reduction in sulfur dioxide (SO_2) emissions at the Navajo Generating Station ("Navajo" or "NGS") in northern

Arizona, at an estimated cost of $89,600,000 per year (an approximate present value cost of $1 billion).

Navajo is a coal-fired electric generating station located seven miles east of Page, Arizona, just south of Lake Powell. Petitioner CAWCD is the local Arizona government entity responsible for operating, maintaining, and repaying the reimbursable costs of the Central Arizona Project ("CAP"). The CAP is a federal reclamation project established pursuant to the Colorado River Basin Project Act to provide Colorado River water to central and southern Arizona. 43 U.S.C. §§ 1501, *et seq.* The primary source of electricity for pumping CAP water is the United States Bureau of Reclamation's ("Reclamation's") 24.3% share of the output of Navajo. CAWCD is thus responsible for repaying most of Reclamation's 24.3% share of the costs of the emissions controls imposed by the Final Rule. CAWCD has estimated that the Final Rule will result in an increase of approximately $70 million in CAWCD's capital cost repayment obligation for the CAP and an increase of approximately $7.5 million per year in the costs of operating the CAP. The emissions controls imposed by the Final Rule will allegedly improve winter average visibility in the Grand Canyon National Park by 7%.

The EPA's authority to impose emissions controls on Navajo was premised on Section 169A of the Clean Air Act, 42 U.S.C. § 7491. Section 169A directs the EPA to promulgate regulations requiring states containing Class I areas (essentially, national parks, among them the Grand Canyon) to amend their "state implementation plans" to include "emission limits, schedules of compliance and other measures as may be necessary to make reasonable progress toward meeting the national goal" of remedying any existing impairment of visibility in such areas resulting from man-made pollution and preventing future impairment. CAA § 169A(a)(4) and (b)(1), 42 U.S.C. § 7491(a)(4) and (b)(1) (Appendix, pp. 204 and 205).

The EPA adopted a phased approach to dealing with the visibility problem when it promulgated regulations in 1980 in response to Congress's directive. Acknowledging that the complex and sophisticated air quality monitoring techniques necessary to evaluate the visibility benefits of regional haze controls had not yet been developed, the EPA limited its 1980 regulations to visibility impairment traceable by visual observation or other simple

monitoring techniques to a single source or small group of sources, commonly known as "Phase I" visibility impairment. 45 Fed. Reg. 80084 at 80085 (December 2, 1980) (Appendix, p. 81); 40 C.F.R. § 51.300 *et seq.* (Appendix, p. 162); 45 Fed. Reg. 34762 at 34779 (May 22, 1980) (Appendix, p. 161). The adoption of Phase II regulations dealing with the sources of regional haze was deferred. Phase II regulations have not, as yet, been promulgated.

In the notice of proposed rulemaking for the 1980 Phase I regulations, the EPA defined the distinction between Phase I and Phase II visibility regulations as follows:

> [T]he Agency is defining the scope of the Phase I regulations by the term "reasonably attributable" which is defined as attributable to a single source or group of sources by visual observation or other monitoring techniques. The key distinction between this Phase I definition and future phases is by what means a source can be identified.

45 Fed. Reg. 34762 at 34779 (emphasis added) (Appendix, p. 161).

This focus on the "means" by which "a source can be identified" was incorporated into the final rulemaking. After stating that present mathematical models and monitoring techniques showed promise, the EPA nevertheless found that these techniques had to be further evaluated "according to standard Agency procedures" before their use could be required in a regulatory program. 45 Fed. Reg. 80084 at 80085 (Appendix, p. 81). The EPA then pointed out that the origin of impairment caused by a single source or small group of sources could, in some instances, be identified "without the use of sophisticated analytical techniques. Simple monitoring techniques such as visual observation (either ground based or with aircraft) can often identify sources which contribute to the impairment." The agency relied entirely on the "scientific and technical limitations" of mathematical models and more sophisticated monitoring techniques in restricting its Phase I regulatory program to the use of visual observation and simple monitoring techniques. 45 Fed. Reg. 80084 at 80085 (Appendix, p. 81).

The regulatory distinction that EPA drew between Phase I and II, which is based on the means by which a source can be identified, is consistent with the EPA's description of the "two types of air pollution which reduce or impair visibility:

(1) Smoke, dust, colored gas plumes or layered haze emitted from stacks which obscure the sky or horizon and are relatable to a single source or a small group of sources; and

(2) widespread, regionally homogeneous haze from a multitude of sources which impairs visibility in every direction over a large area."

Id. at 80085[2] (emphasis added) (Appendix, p. 80).

The Phase I regulations thus contemplated that, if simple monitoring techniques such as visual observation (either ground-based or with aircraft) or time-lapse photography could identify the source of an impairment because the plume or haze emanating from it could be followed into a Class I area, the source could be regulated. 45 Fed. Reg. 80084 at 80085 (Appendix, p. 81). If not, regulation had to be deferred, because visual observation and simple monitoring (*e.g.*, photography) were the only techniques found to be reliable enough for regulatory decisions. *Id.*

In its report entitled "Protecting Visibility: An EPA Report to Congress" (1979), published shortly before the promulgation of the 1980 regulations, the EPA identified the following monitoring techniques as appropriate for visibility monitoring programs in Class I areas: human observation, integrating nephelometer, multi-wavelength telephotometer, transmissometer and photography. Docket A-79-40, II-A-5, pp. 3-2 through 3-6 (Appendix, pp. 221-223). Nephelometer, telephotometer, and transmissometer optical devices merely enhance the human eye. *Id.* *See also* 40 C.F.R. §§ 52.26(c)(2), (c)(3) (1992) (Appendix, pp. 180, 181).[3]

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[2]In implementing its Phase I regulations, the EPA has used the term "plume blight" as shorthand for the first type of impairment and "regional haze" for the second type. 52 Fed. Reg. 7802 (March 12, 1987) (Appendix, p. 66).

[3]40 C.F.R. § 52.26(c) establishes that, when a state implementation plan has been disapproved by the EPA (as in this case), the Administrator must monitor visibility within each visibility protection area in the state to determine, inter alia, "reasonably attributable visibility impairment caused by a source or a small group of sources for that area." In doing so, the Administrator "shall use the following as appropriate to monitor visibility within each such area: (i) photographic cameras, (ii) fine particulate matter samplers, (iii) teleradiometers, (iv) nephelometers, (v) human observation, or (vi) other appropriate technology."

Until it made its determination to regulate Navajo, the EPA had relied exclusively on visual observation and simple monitoring techniques in analyzing certifications of visibility impairment by Federal Land Managers in other Class I areas.[4] For example, EPA "reviewed the slides provided by the National Park Service [NPS] to illustrate uniform haze in NPS managed lands. For the most part, EPA could not determine that the impairment was reasonably attributable." 52 Fed. Reg. 7802 at 7804 (March 12, 1987) (emphasis added) (Appendix, p. 67). EPA thus concluded, "[S]ince the regulations are not designed to address uniform or regional haze, the EPA is proposing that BART [Best Available Retrofit Technology] requirements or other control measures are unnecessary at this time in the FIP's [federal implementation plans] for 28 states." *Id.*

In connection with Voyageurs National Park in Minnesota, the National Park Service ("Park Service") "installed an 8mm time-lapse photographic system to view north across Kabetogama Lake." "[T]he data . . . displayed no distinct, identifiable plumes entering the Class I area. Thus, ARS concluded that no visibility impairments in Voyageurs National Park could be presently traced to specific sources." 53 Fed. Reg. 35956 at 35958 (September 15, 1988) (emphasis added) (Appendix, p. 60). Similarly, EPA noted "that NPS is deploying in the Saguaro Wilderness a camera system" to determine whether visibility impairment could be attributed to a specific source. *Id.*

EPA found it unnecessary to revise the Arizona FIP in connection with the Petrified Forest National Park because photographic monitoring did not "display identifiable plumes" that were "identifiable or traceable to a specific source." 53 Fed. Reg. 35956 at 35958 (Appendix, p. 61). Even when a "yellowish plume"

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40 C.F.R. § 52.26(c)(2), (c)(3) (Appendix, pp. 180, 181).

[4]The Phase I regulations provide for Federal Land Managers ("FLM") to identify whether visibility impairment exists in Class I federal areas. Pursuant to 40 C.F.R. § 51.302(c)(4)(i), when an FLM certifies that a Class I federal area in a state contains Phase I visibility impairment, that state must identify each existing stationary facility which may "reasonably be anticipated to cause or contribute" to any such impairment which is "reasonably attributable" to that existing stationary facility and analyze for BART (Best Available Retrofit Technology) any facilities so identified (Appendix, p. 170).

was detectable when looking in the direction of a particular power plant, the EPA concluded that the impact on the entire field of view of the Brigantine Wilderness area would be small and would occur infrequently, and that modification of the power plant would not result in significant differences from existing conditions. 52 Fed. Reg. 7802 at 7805 (March 12, 1987)[5] (Appendix, p. 68). The EPA also addressed the FLM's certification of impairment in Moosehorn Wilderness as follows:

> . . . [T]he EPA does not have adequate data to positively identify these sources or to complete a BART analysis. The EPA, in cooperation with the FLM is planning to install photographic monitoring equipment in Moosehorn to develop a data base for regulatory decision making. (Emphasis added.) 52 Fed. Reg. 7802 at 7806 (Appendix, p. 71).

On March 24, 1986, the Department of Interior sent a letter to the EPA which certified that visibility impairment existed in the Grand Canyon and identified SO_2 emissions from Navajo as a probable source of impairment during the winter months. 56 Fed. Reg. 50172 at 50173[6] (Appendix, p. 7).

Sulfur dioxide (SO_2) is a colorless gas. It is not visible when "emitted from stacks." Therefore, it does not cause visible plumes and cannot give rise to plume blight. Only the chemical conversion of SO_2 to sulfate (SO_4) can affect visibility. This conversion requires time, distance and conducive meteorological conditions. The EPA recognized this fact when it described the scope of its 1980 Phase I regulations:

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[5]During the same time frame in which it was evaluating certifications of visibility impairment by using only simple monitoring techniques as contemplated by the Phase I regulations, the EPA also took the position in litigation that regulation of regional haze in the absence of Phase II regulations was prohibited. *See State of Maine v. Thomas*, 874 F.2d 883 (1st Cir. 1989); *State of Vermont v. Thomas*, 850 F.2d 99 (2d Cir. 1988).

[6]Under the Phase I regulations, following FLM certification of impairment, a state (or the EPA, upon default by the state), is required to analyze for BART any facility identified as a "reasonably attributable" source of the impairment. 40 C.F.R. 51.302(c)(4)(i) (Appendix, p. 170). If visibility impairment in the Grand Canyon could be found to be "reasonably attributable" to Navajo, then the facility would have to be analyzed for BART.

> The pollutants of primary concern under this Phase I program are particulate matter and NO_x. Emissions of SO_2 primarily contribute to regional haze which is beyond the scope of this Phase I program.

45 Fed. Reg. 80084 at 80087 (Appendix, p. 86). A month before it adopted its Phase I regulations, the EPA observed, in one of its user's manuals, that "sulfate formation is a long-range (greater than 100 Km), multiday phenomenon, not a near-source problem."[7] The BART Guidelines under the Phase I regulations confirmed that emissions of sulfur dioxide, which contribute to regional haze, "will be addressed in later phases."[8]

Following the FLM certification which identified Navajo as a potential source of impairment, the Park Service interpreted data gathered in a controversial monitoring experiment conducted in the winter of 1987 (the "WHITEX" study) to attempt to determine whether visibility impairment at the Grand Canyon could be deemed to be reasonably attributable to Navajo. The WHITEX monitoring study had involved the release of deuterated methane (CD_4), an inert tracer (i.e., a chemical not found in the ambient air), from the stacks at Navajo in an attempt to correlate the CD_4 tracer to SO_2 emissions from Navajo and to the sulfate that might later form from the Navajo SO_2. Using the WHITEX data, the Park Service applied unproven and sophisticated linear regression analysis techniques, TMBR (Tracer Mass Balance Regression) and DMB (Differential Mass Balance), to attribute to Navajo a portion of the sulfates found in the Grand Canyon during the experiment period. These techniques had not been previously used to attribute secondary aerosols, such as SO_4, to sources of SO_2.

Based entirely on the Park Service's preliminary analysis of WHITEX, the EPA issued a notice of proposed rulemaking on September 5, 1989, finding that Navajo could reasonably be anticipated to cause or contribute to visibility impairment during the

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[7]User's Manual For the Plume Visibility Model (PLUVUE), Docket A-79-40, V-A-6, p. 33 (Appendix, p. 225).

[8] EPA Docket A-89-02A, II-A-1, p. 4. The BART Guidelines describe the statutorily-required procedures to be followed when a source is identified as a "reasonably attributable source of impairment." 56 Fed. Reg. 50172 at 50173 (Appendix p. 5).

winter months in the Grand Canyon and that a BART analysis should be conducted. 54 Fed. Reg. 36948 (September 5, 1989). The EPA solicited comments on the merits of its preliminary attribution determination.

SRP, its consultants, and others, including CAWCD, submitted comments severely criticizing the analyses, methodologies and conclusions contained in the Park Service reports on WHITEX.

Because of the scientific controversy over the Park Service analysis of the WHITEX data, the National Research Council of the National Academy of Science ("NAS") was asked by the Department of the Interior to evaluate the Park Service WHITEX report and other scientific evidence relevant to EPA's preliminary finding that wintertime visibility impairment in the Grand Canyon was attributable to Navajo. 56 Fed. Reg. 5173 at 5179 (February 8, 1991).

The resulting report by the NAS (the "NAS Report") observed that quantitative attribution of SO_4 to Navajo based on TMBR and DMB was not possible.[9] The NAS Report further noted that the literature regarding TMBR, a multiple linear regression (MLR) technique, "does not contain convincing evidence" that it can be used to apportion secondary species, such as SO_4. As to DMB, the NAS Report stated that this use of the MLR technique "appears to be unprecedented in the source-apportionment literature." The NAS Report concluded that the WHITEX data analysis precluded a determination of the extent to which Navajo contributed to haze in the Grand Canyon due "to problems with implementation and interpretation of multiple linear regression models." Docket A-89-02A, II-D-36, pp. 19, 21.

Despite the scientific controversy over the techniques, methodologies and conclusions used by the EPA in making the determination, the Final Rule, published on October 3, 1991, proceeded to reaffirm the EPA's earlier attribution finding. 56 Fed. Reg. 50172 at 50177 (Appendix, pp. 19-20).

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[9]The NAS Report concluded that while at some times during the study period, Navajo contributed significantly to sulfate aerosol measurable at Hopi Point in the Grand Canyon, the Park Service Report could not quantitatively determine the fraction of sulfate aerosol and resultant haze attributable to Navajo emissions.

The EPA, recognizing its vast departure from prior applications of its Phase I regulations, specifically limited the precedential effect of its action, reasoning that:

> ...This is so because the outcome of this rulemaking has been highly dependent upon facts and circumstances that are unique to this proceeding and thus does not apply to other cases. For example, the tracer studies and other analyses contained in the WHITEX and NGSVS reports that are key to a showing that impairment at GCNP is traceable to NGS are not being approved for use in any other rulemaking addressing other potential sources of visibility impairment.

56 Fed. Reg. 50172 at 50184 (emphasis added) (Appendix, p. 44).

Following promulgation of the Final Rule, CAWCD timely filed a petition for review of the EPA's action. CAWCD invoked the Ninth Circuit's jurisdiction under 42 U.S.C. 7607(b)(1) to review "the Administrator's action in approving or promulgating any implementation plan." (Appendix, p. 210.) Among its challenges to the Final Rule, CAWCD argued that EPA had exceeded its regulatory authority because it had relied on sophisticated and complex modeling techniques in attributing visibility impairment to Navajo, in direct contravention of its Phase I regulations.

The Ninth Circuit, ignoring the EPA's previous posture in litigation and its historical interpretation and implementation of the Phase I/Phase II distinction, concluded that "the Final Rule was legitimately promulgated under Phase I regulations" directed at "reasonably attributable" visibility impairment. (Opinion, p. 2730.) The Court found that "reasonably attributable" was defined as "attributable by visual observation or any other technique the State deems appropriate" (40 C.F.R. § 51.301(s)) (Appendix, p. 167), and that since the EPA was "standing in the shoes of the defaulting state, it had wide discretion in selecting the techniques used."

(Opinion, p. 2732.)[10] The Ninth Circuit denied CAWCD's petition for review.

REASONS FOR GRANTING WRIT

I. The Ninth Circuit's Decision Allows the EPA To Ignore Its Own Regulations and Leaves the Application of the Clean Air Act in a State of Confusion.

"A precept which lies at the foundation of the modern administrative state is that agencies must abide by their rules and regulations." *Reuters Ltd. v. F.C.C.*, 781 F.2d 946 (D.C. Cir. 1986). The Ninth Circuit has manufactured a new set of criteria by which the EPA, without an opportunity for public notice or comment, may regulate visibility impairment in Class I areas. In upholding the EPA's imposition of emission controls at Navajo based on technology and methodology which the EPA itself has acknowledged are still inadequately developed for use in a regulatory program dealing with visibility impairment, the court has improperly extended the agency's authority. Over a period of more than eight years, the EPA limited the application of Phase I regulations to sources identifiable by visual observation or simple monitoring techniques. In this case, the EPA *ad hoc* reversed its position and applied § 169A to a Phase II situation without first promulgating Phase II regulations or evaluating the new techniques used "according to standard agency procedures."[11] The court has thus condoned the EPA's violation of its own regulations and the EPA's circumvention of the requirement that it adopt Phase II regulations before regulating a source which cannot be identified by visual observation or simple monitoring techniques.

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[10]The Ninth Circuit failed to note that the EPA's responsibilities, after disapproving a state implementation plan, were established by 40 C.F.R. § 52.26(c), not by § 51.301(s). Moreover, § 51.301(s) is only a guideline to the states while § 52.26 is an enforceable provision of state implementation plans.

[11]45 Fed. Reg. 80084 at 80085 (Appendix, p. 81). In other contexts, EPA has developed detailed procedures for the evaluation of monitoring and testing techniques to be used to determine compliance with the requirements of the Clean Air Act (*see, e.g.*, 40 C.F.R. Part 53 (1992)), and has also adopted regulations to assure regulatory consistency among its various Regions (*see* 40 C.F.R. Part 56 (1992)).

The EPA has been allowed to ignore its own rules, its statements of policy concerning its rules and its prior application of these rules in order to achieve, *ad hoc*, a desired result. If the EPA's action is sanctioned, our government will have been allowed to violate one of the fundamental principles of democratic institutions — to be "a government of laws, and not of men." *Marbury v. Madison*, 5 U.S. 137, 1 Cranch 137, 163 (1803). The unprecedented expansion of the EPA's 1980 Phase I regulations should thus be addressed by this Court.

A. The Ninth Circuit's decision is inconsistent with the decisions of other circuits in related proceedings.

Not only is the position taken by the EPA and confirmed by the Ninth Circuit inconsistent with the EPA's Phase I regulations, it directly contradicts the decisions reached, and indeed the EPA's own posture, in prior related proceedings. In *State of Vermont v. Thomas*, 850 F.2d 99 (2nd Cir. 1988), the Second Circuit confirmed the EPA's contention that the agency has no current authority to regulate regional haze and that measures addressing regional haze cannot be part of a federally enforceable implementation plan. 850 F.2d at 103. The State of Vermont, the petitioner in that case, had proposed to adopt a state implementation plan aimed at emissions originating chiefly from out-of-state power plants. The Vermont plan contained extensive technical analysis demonstrating that the Lye Brook National Wilderness Area's visibility impairment was due primarily to sulfur dioxide pollution originating from these power plants. 850 F.2d at 101. Vermont argued that, while EPA's 1980 regulations admittedly deferred action on regional haze for future phases of the visibility program, they were also intended to allow for the evolution of strategies for combating regional haze as technologies improved. 850 F.2d at 103. The EPA strenuously disagreed, stating that sources contributing to regional haze could simply not be regulated "until such time as EPA decides to promulgate a national regional haze program." 850 F.2d at 102. The Second Circuit affirmed EPA's disapproval of the Vermont implementation plan and concluded, at the EPA's urging, that the EPA intended to limit the Phase I regulation of visibility impairment exclusively to what the EPA described as "plume blight." 850 F.2d at 103.

The First Circuit reached the same conclusion in *State of Maine v. Thomas*, 874 F.2d 883 (1st Cir. 1989). In *State of Maine*,

several states and various environmental groups sued the EPA to compel it to promulgate the Phase II regional haze regulations it had deferred adopting when it issued the 1980 Phase I regulations. The court acknowledged, again at EPA's urging, that the Phase I regulations classify air pollution impairing visibility as either plume blight ("[s]moke, dust, colored gas plumes, or layered haze . . . which obscures the sky or horizon and are relatable to a single source or a small group of sources") or regional haze, and that the EPA's regulations treat the two categories separately. 45 Fed. Reg. 80084 at 80085 (Appendix, p. 80); *State of Maine*, 874 F.2d at 885. While the question in *State of Maine* was whether the EPA's promise to promulgate Phase II regional haze regulations was "final" for purposes of the court's jurisdiction, the opinion makes the essence and rationale of the Phase I regulations crystal clear:

> Phase I represented EPA's assessment of what might reasonably be done *in 1980*. Its assessment of its capacity to understand the problem of regional haze went unreviewed, as did its decision to bifurcate the visibility problem (plume blight being treated one way, regional haze another), because neither was challenged within the 60-day period provided by Section 7607. ... [T]he decision to postpone regional haze regulations "was based on an extensive and published administrative record which reflects citizen and agency concerns, the intent to defer, and a rationale based on [the lack of adequate] technological and scientific information."

874 F.2d at 886, *quoting State of Maine v. Thomas*, 690 F.Supp. at 1111-12.

The court went on to note:

> Here, EPA announced Phase I as a regulatory scheme, fully explained and defended in the text setting out the regulations. Furthermore, the administrative proceedings had directly addressed the possibility that regional haze rules and orders might be delayed. To mince no words, the decision to defer constituted a fully developed part of the final action taken on the statutory mandate. Indeed, it is no exaggeration to say that EPA announced this final action — the phased approach — as its response to Congress' command. Because a final action need not consist solely

> of standard rules or orders, we agree "that EPA intended to limit the [1980] regulations to plume blight." *Vermont v. Thomas*, 850 F.2d 99, 103 (2d Cir. 1988). Nonetheless, the final action taken has legal effect and establishes procedural requirements, such as substantive conditions and consequent deadlines, for establishing future phases.

874 F.2d at 887-88 (emphasis added).

The First Circuit concluded that the EPA's actions in 1980 represented "a rulemaking consensus that it [the agency] could deal substantively with plume blight but not with regional haze." 874 F.2d at 891. The court emphasized that, while EPA had bound itself to propose and promulgate future phases "when improved monitoring techniques yield data, when models become refined, and when scientific knowledge improves," a full and appropriate rulemaking procedure would be required. 874 F.2d at 890.

The EPA has defined the distinction between Phase I plume blight and Phase II regional visibility impairment, both in theory and in practice, as "by what means a source can be identified." 45 Fed. Reg. 34762 at 34779 (Appendix, p. 161). The EPA has acknowledged that visibility impairment which is not detectable by visual observation or simple monitoring techniques does not fall within the scope of its Phase I regulatory authority. 45 Fed. Reg. 80084 at 80085 (Appendix, pp. 81-82). It is thus evident that, consistent with the decisions in *State of Vermont* and *State of Maine*, the regulation of a source based on an attribution derived from sophisticated and unproven mathematical models and complex monitoring techniques, as was done here, is beyond the EPA's current authority.

In its Opinion, the Ninth Circuit reasons that *State of Vermont* is inapposite because it involved "a direct and explicit attempt to regulate 'regional haze'," where in this case the EPA has clearly stated that its action addresses "reasonably attributable" (Phase I) impairment. Opinion at 2730.

The Ninth Circuit's distinction, one urged upon it by the EPA, is meaningless. The fact that the EPA has postured its action in the Final Rule as addressing Phase I impairment is not dispositive. That distinction can legally be drawn only by analyzing whether "reasonable attribution" can be made through simple monitoring techniques or visual observation. If it cannot, then a Phase II

impairment and a Phase II attribution determination are necessarily involved.

In upholding the EPA's interpretation of the Phase I rules in *State of Vermont*, the First Circuit relied on the EPA's argument that its Phase I rules were limited to plume blight (traceable streams of smoke, dust, or colored gas which may be followed to a Class I area) because "plume blight obviously was more susceptible to identification, measurement and thus control" and, as to Phase II impairment, that "monitoring and other scientific techniques" had not "progressed to a point that EPA could develop a regulatory program for that type impairment." 850 F.2d at 101.

In its regulation of Navajo, the EPA has effectively eliminated the distinction between its Phase I and Phase II program, arguing (1) that any contribution by a single stationary source to visibility impairment is adequate to justify its regulation under Phase I, and (2) that the determination of whether such a contribution has occurred may be based on the use of any techniques the state or the EPA deems appropriate. On this basis, each of the power plants on which Vermont sought to impose emission controls in *State of Vermont* should have been subject to regulation under EPA's 1980 Phase I visibility rules. Nonetheless, EPA rejected Vermont's proposed state implementation plan on the grounds that the EPA's 1980 Phase I rules did not permit such regulation. 850 F.2d at 102.

The Ninth Circuit seeks support for its interpretation by stating that under 40 C.F.R. § 51.301(s), "reasonably attributable" is defined as "attributable by visual observation or any other technique the state deems appropriate." Since the EPA is standing "in the shoes of a defaulting state" under 42 U.S.C. § 7410(c) in promulgating the Arizona federal implementation plan, the Ninth Circuit posits that the EPA has "broad discretion in determining whether visibility impairment is 'reasonably attributable' to a given source."

The Ninth Circuit's reliance on 40 C.F.R. § 51.301(s) is misplaced. The EPA is required to follow the provisions of 40 C.F.R. § 52.26 when, as here, it acts upon the failure of a state to adopt appropriate visibility provisions. The regulation, in effect since 1985, states that "[t]he Administrator shall use the following as appropriate to monitor visibility" for purposes of determining reasonably attributable impairment: (i) photographic cameras, (ii)

fine particulate samplers, (iii) teleradiometers, (iv) nephelometers, (v) human observation or (vii) "other appropriate technology." 40 C.F.R. § 52.26(c)(2), (3) (1992) (Appendix, pp. 180-181).[12] The term "other appropriate technology" is plainly limited to established and visually oriented monitoring methods similar to those listed. *See, e.g., State of Nevada v. Herrington*, 827 F.2d 1394, 1396 (9th Cir. 1987) (in interpreting the phrase "through negotiation, arbitration, or other appropriate mechanisms," the court applied the rule of *ejusdem generis* to limit the term "other appropriate mechanisms" to matters similar to those earlier specified.) (Emphasis added.)

By its terms, 40 C.F.R. § 51.301(s) applies only to states. The EPA is governed by 40 C.F.R. § 52.26 when it acts where a state has failed to act. The complex, unproven techniques used by the Administrator to justify the Final Rule are not of the type specified in § 52.26. In fact, the Final Rule declared that the techniques used in the Navajo attribution were not approved "for use in any other rulemaking addressing other potential sources of visibility impairment." 56 Fed. Reg. 50172 at 50184 (Appendix, p. 44).

Even if 40 C.F.R. § 51.301(s) were applicable, the Ninth Circuit's reasoning is flawed. "Any other technique the state deems appropriate" does not mean that a state may utilize mathematical models and complex experimental techniques which the EPA has deemed to be inappropriate for evaluating visibility impairment, and thus beyond the scope of its Phase I regulations. If the Ninth Circuit's analysis was correct, Vermont's attempt to regulate power plant sources of visibility impairment would have perforce been approved by EPA or upheld by the reviewing court. The EPA cannot be relieved from its own regulations merely by attempting to stand in a state's shoes. The Ninth Circuit's interpretation renders the Phase I/Phase II dichotomy meaningless.

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[12] This regulation was applicable to the Administrator when he promulgated the Final Rule to deal with visibility impairment in the Grand Canyon. 40 C.F.R. §§ 52.26(a),(c); 52.145(b); 51.403 (1992). It also applies to states such as Arizona, who have failed to act (40 C.F.R. §§ 52.145(a),(b)), and necessarily modifies and constrains the broad definition of "reasonably attributable" which applies to states when they adopt approvable visibility implementation plans. *See* 40 C.F.R. §§ 51.305; 52.26(c)(1) (1992).

B. The decision below is inconsistent with the EPA's prior interpretation and application of its Phase I regulations.

The Ninth Circuit also seeks justification for its decision on the assertion that attribution can be made on the basis of "any" contribution to visibility impairment. However, *State of Vermont* and *State of Maine* make it quite clear that only Phase I impairment may be attributed to a source. 850 F.2d at 101. The Ninth Circuit's interpretation is contrary to the history and all previous implementation of the 1980 Phase I regulations by the EPA, and reflects misunderstanding as to the policy behind the EPA's phased approach to regulation of visibility impairment.

The Ninth Circuit's decision fails to consider the EPA's prior interpretation of the Phase I regulations, and thus perpetuates an inconsistent application of the Agency's previously established position. In determining whether an agency's construction and application of a statute is correct, the courts must consider the consistency with which an agency interpretation has been applied and whether the interpretation was contemporaneous with the enactment of the statute being construed. *NLRB v. United Food and Commercial Workers Union*, 484 U.S. 112, 124, n. 20 (1987).

Where an agency has interpreted and applied its regulations inconsistently, its actions have been found to be arbitrary and capricious. Thus, in *PPG Industries, Inc. v. Harrison*, 660 F.2d 628 (5th Cir. 1981), the court stated "when as here the agency's construction of its own administrative regulations is in issue, the court must . . . determine whether the agency's reading of the regulations is reasonable and consistent over time." 660 F.2d at 633. In *PPG*, the Fifth Circuit reviewed EPA's application of new source performance standards and found that the agency's application of such standards to PPG was inconsistent with its previous positions on the use of high sulfur fuel boilers. The court analyzed the language of the regulation and the "EPA materials surrounding its promulgation," and concluded that "such inconsistency must be viewed as arbitrary and capricious." 660 F.2d at 634. *See also American Meat Institute v. EPA*, 526 F.2d 442, 459 (7th Cir. 1975) (the agency's total suspended solids effluent limitations were arbitrary and capricious because EPA's rejection of questionnaire data on this occasion was inconsistent with its preference for such data in other instances); *American Methyl*

Corp. v. EPA, 749 F.2d 826, 834, 837-39 (D.C. Cir. 1984) (EPA's past administrative practice belied its present position that it had implied authority to revoke waivers to market new fuels without following control procedures.)

EPA's contemporaneous explanation of its 1980 Phase I regulations defined "reasonably attributable" as attributable to a single source or group of sources "by visual observation or other monitoring techniques." 45 Fed. Reg. 34762 at 34779 (Appendix, p. 161). As previously described, all of the EPA's actions in analyzing certifications of visibility impairment following its adoption of the 1980 Phase I regulations and prior to the Final Rule regulating Navajo were consistent with this definition:

- Voyageurs National Park: Time lapse photography displayed no distinct, identifiable plumes.
- Petrified Forest National Park: Photographic monitoring equipment did not display identifiable plumes traceable to a specific source.
- Brigantine Wilderness: Yellowish plume detectable by visual observation.
- Moosehorn Wilderness: The EPA planned to install photographic monitor.
- Saguaro Wilderness: Camera system deployed.

(*See*, pp. 6-7, *supra*.)

The EPA's action on Navajo directly contravenes the contemporaneous interpretation it gave to its Phase I regulations upon adoption, as well as its application of those regulations in analyzing certifications of visibility impairment in other Class I areas.

The Ninth Circuit has created a confusing precedent, which will be implicated in every attempt to regulate sources of visibility impairment in Class I areas. The Ninth Circuit's Opinion is likely to generate confusion among other circuits. In addition, it gives the EPA unprecedented and virtually unchecked power in making a decision as to whether visibility impairment is attributable to a source. Consideration of this matter by the Court is thus essential for effective administration of the Clean Air Act and to prevent widespread litigation.

II. The EPA Failed to Amend Its Phase I Regulations In Accordance With Notice and Comment Procedures Under the Clean Air Act.

The EPA's action in regulating Navajo based on criteria and methodology not encompassed by its existing regulations is a violation of its own rules and of the notice and comment rulemaking provisions of the Clean Air Act. The Clean Air Act specifically provides that its rulemaking provisions shall apply to "revision of regulations . . . relating to . . . protection of visibility[.]," (*i.e.*, the Phase I regulations promulgated pursuant to CAA § 169A, 42 U.S.C. § 7491 at issue here.) CAA § 307(d)(1)(J), 42 U.S.C. § 7607(d)(1)(J) (emphasis added) (Appendix, p. 212).

The EPA's action in going beyond visual observation and simple monitoring techniques to identify Navajo as a contributor to visibility impairment constituted a revision to its Phase I regulations. Before using the techniques used here to regulate a source like Navajo, the EPA was required to follow the rulemaking procedures established under the Clean Air Act and to adopt Phase II visibility rules. By failing to do so, the EPA violated the statute.

In *State of Maine*, the First Circuit specifically held that a rulemaking procedure would be required if regulation of sources was attempted based on factors not encompassed by the Phase I regulations. 874 F.2d at 890. The court emphasized that the EPA specifically limited its regulatory power when it adopted the Phase I regulations in 1980:

> Here, EPA bound itself to "propose and promulgate future phases" anent uniform haze when improved monitoring techniques yield data, when models become refined and when scientific knowledge improves (emphasis added).

Id.

The court acknowledged that if the petitioners (who sought regulation of sources contributing to regional haze) could demonstrate that those conditions were now satisfied, the EPA could reject their petition for rulemaking only if the EPA rescinded those aspects of Phase I which bound the agency "to rulemaking based on a limited set of factors" (*i.e.*, visual observation and simple monitoring techniques). *Id.* The court concluded that "[a]ny such

rescission, of course, would require implementation of a full and appropriate rulemaking procedure." 874 F.2d at 890.

What the petitioners sought to do in *State of Maine* is exactly what the EPA has done here: to regulate a source based on attribution determined by applying unproven monitoring techniques and scientific models without having gone through the necessary rulemaking procedures to either implement Phase II or modify the scope of the Phase I regulations.

State of Maine specifically holds that the Phase I regulations have binding force on the EPA:

> EPA's very claim that Phase I was final when issued . . . is equivalent to a claim *sotto voce* that Phase I from the outset had the force of law, affecting the rights of citizens to enforce statutory duties. And it is settled that "[w]here the rights of individuals are affected, it is incumbent upon agencies to follow their own procedures. This is so even where internal procedures are possibly more rigorous than otherwise would be required." (Citations omitted.)

874 F.2d at 890.

This Court and the federal courts have repeatedly set aside agency attempts to amend or rescind or reinterpret existing regulations without strict adherence to a process of reasoning on the record with the benefit of informed suggestions from those affected by the proposed change:

> One of the central purposes of the notice and comment requirements is to allow public participation in the promulgation of rules which have a substantial impact on those regulated. . . . [I]f the rule constitutes a change in prior agency position and has a substantial impact on the rights and obligations of [affected parties], the rule would be invalid for failure to comply with the notice and comment requirements.

National Retired Teachers Ass'n. v. U.S. Postal Service, 430 F.Supp. 141 (D.C.D.C. 1977), *affirmed* 593 F.2d 1360 (D.C. Cir. 1979). *See also, Motor Vehicle Manufacturer's Assn. v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29 (1983) (A settled course of behavior by a regulatory agency embodies the agency's informed judgment that by pursuing that course it will carry out the policies

committed to it by Congress, and accordingly an agency changing its course [by rescinding a rule] is obligated to provide a reasoned analysis for the change); *Environmental Defense Fund Inc. v. Environmental Protection Agency*, 716 F.2d 915 (D.C. Cir. 1983) (termination of certain reporting requirements under the Resource Conservation and Recovery Act required notice and comment rulemaking); *Environmental Defense Fund Inc. v. Gorsuch*, 713 F.2d 802 (D.C. Cir. 1983) (deferral of permit process constituted suspension of regulation without the notice and comment required by the Administrative Procedures Act ("APA")); *Detroit Edison Co. v. EPA*, 496 F.2d 244 (6th Cir. 1974) (change in language and application of regulation required compliance with informal rulemaking procedures of APA).

Whether under the Administrative Procedure Act, as in the above-cited cases, or under the rulemaking provisions specifically applicable here under the Clean Air Act, an agency action which has the effect of modifying or reinterpreting a duly promulgated regulation must be conducted according to applicable notice and comment requirements. While here the EPA has taken action in the absence of properly promulgated regulations, the effect of its conduct is to revise the scope of its current regulations. The EPA's failure to conduct rulemaking proceedings to adopt Phase II visibility rules prior to using complex, sophisticated techniques to attribute visibility impairment to Navajo, was a violation of the Clean Air Act and renders the agency's action void. *See, State of Maine v. Thomas*, 874 F.2d at 890-891.

CONCLUSION

In 1980, the EPA determined that visibility impairment would have to be regulated in phases because then-existing scientific techniques for identifying sources of such impairment were limited to visual observation and other simple monitoring methods. The EPA stated that when sophisticated mathematical and modeling techniques were developed, the agency would promulgate Phase II regulations in which these more complex techniques could be fully evaluated. Absent that evaluation, the EPA could not "routinely require their use in a regulatory program for sources, either new or existing, that may impair visibility." 45 Fed. Reg. 80084 at 80085 (Appendix p. 81).

In the Final Rule, the EPA relied on controversial monitoring data and unproven, highly complex and sophisticated analytical techniques to require nearly $1 billion of emission controls at Navajo without the promised Phase II evaluation. The EPA then expressly stated that these techniques were not approved for use elsewhere.

The EPA has clearly violated its own regulations and the rulemaking requirements of the Clean Air Act. Petitioner therefore respectfully requests that this Petition for Certiorari be granted.

Respectfully submitted,

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